

**SENIBONG COVE PROPERTY MANAGEMENT
SERVICES SDN BHD v. LEMBAGA PENILAI, PENTAKSIR,
EJEN HARTA TANAH DAN PENGURUS HARTA**

HIGH COURT MALAYA, KUALA LUMPUR

LEONG WAI HONG JC

[CIVIL SUIT NO: WA-24NCvC-60-01-2022]

9 JUNE 2022

Abstract – *A plaintiff is clearly entitled to seek pre-action discovery of impugned documents containing defamatory words against it, as the production of those said documents is necessary to determine if it can commence a claim against unknown persons making allegations causing it to suffer economic losses. Such discovery order is essential, for disposing fairly of the cause or matter and for saving costs.*

CIVIL PROCEDURE: *Discovery – Pre-action discovery – Application for pre-action discovery to identify intended defendant – Preliminary objection raised – Whether there was statutory immunity for defendant against suits and legal proceedings under s. 31A of Valuers, Appraisers, Estate Agents and Property Managers Act 1981 – Whether documents/information sought privileged – Whether information sought necessary for plaintiff to formulate cause of action against complainants – Whether disclosure of information sought could interfere with or prevent statutory functions of defendant – Whether application fishing expedition – Rules of Court 2012, O. 24 r. 7A & O. 92 r. 4*

This was an application for pre-action discovery by the plaintiff to identify an intended defendant from, *inter alia*, a letter sent by the intended defendant to the defendant, Lembaga Penilai, Pentaksir, Ejen Harta Tanah dan Pengurus Harta ('LPPEH'), a non-party in the proposed suit. The plaintiff wanted to discover the said letter and other documents in the possession of LPPEH with a view of filing a defamation suit against the sender of the letter. The plaintiff's originating summons ('OS') against LPPEH, under O. 24 r. 7A, O. 92 r. 4 of the Rules of Court 2012 ('ROC') and the inherent jurisdiction of the court seeking discovery of (i) the email sent by Josephine Wong, a legal officer with LPPEH, together with full details and disclosing the identity and/or email address(s) of the recipient(s) and/or without any redaction thereto; (ii) the letter sent to LPPEH by the unknown person(s) which was referred to and/or specified in the email; (iii) any further and/or other letter, email and/or correspondence between the unknown person(s) and LPPEH concerning the plaintiff and/or containing defamatory statements made against the plaintiff. The plaintiff averred that all companies that undertake property management were required to register with LPPEH pursuant to the Valuers, Appraisers, Estate Agents and Property Managers Act 1981 ('Valuers Act'). LPPEH implemented two policies, namely the

- A liberalisation policy and the non-liberalisation policy, and the same had affected the plaintiff's registration with LPPEH. Pursuant to the implementation of the liberalisation policy, the plaintiff was required to submit a fresh application to be registered as a property manager under the said policy. The plaintiff, under its previous name (Senibong Cove Management Services), submitted its application to be registered as a property manager under the liberalisation policy ('plaintiff's application') and had been taking active steps in complying with LPPEH's requirements in relation to its application. The plaintiff was informed by the LPPEH's officer that the documents required for the application were all in order and the requirements had been duly complied with. However, when the plaintiff's application was under process, an unknown person(s) ('unknown person(s)') issued a letter to LPPEH to raise groundless issues concerning the registration status of the plaintiff. Josephine Wong replied to the impugned letter to LPPEH *vide* an email ('LPPEH's email') with certain clarifications. The unknown person(s) proceeded to circulate LPPEH's email to the Chairmen of the development projects under Senibong Cove and the residents of Senibong Cove, and further published and/or caused to be published words which were defamatory of the plaintiff in a letter attached to LPPEH's email, and to other parties, alleging amongst others, that the plaintiff was an illegal and incompetent property manager. Subsequently, another email containing defamatory statements against the plaintiff was sent by one Anthony L Emms to LPPEH ('impugned email to LPPEH'). Circumstances gave rise to the reasonable belief that the unknown person(s) who sent the impugned letter to LPPEH could be Anthony L Emms and/or person(s) connected with Anthony L Emms. LPPEH then made a police report based on the defamatory contents in the same and as a result, the plaintiff's application was suspended indefinitely. Without the requisite authority to practice under the Valuers Act, the plaintiff was not allowed to carry out property management practice and by reason of which the plaintiff, *inter alia*, suffered loss of profits as a result of the letters and emails containing untrue allegations against the plaintiff as a result of the unknown person's conduct. The plaintiff thus brought a claim against the parties responsible for the defamatory remarks made against the plaintiff as well as for the economic damage and/or losses suffered by the plaintiff as a result of those defamatory remarks ('the intended claim'). LPPEH raised a preliminary objection that the plaintiff's OS against LPPEH was unsustainable as there was a statutory immunity for LPPEH against suits and legal proceedings under s. 31A of the Valuers Act. LPPEH also opposed the pre-action application on these grounds (i) the documents/information sought by the plaintiff were privileged; (ii) the information sought from LPPEH were not necessary for the plaintiff to formulate its cause of action against the complainants; (iii) disclosure of the information sought could interfere with or prevent the statutory functions of LPPEH; and (iv) this application was a fishing expedition by the plaintiff.

Held (allowing application but confined to discovery to only one letter out of two specified documents and a class of documents):

- (1) Pre-action discovery applications do not fall within the ambit of statutory immunity against actions, suits or prosecution such as in s. 31A of the Valuers Act as there was no suit alleging wrongdoing on the part of LPPEH warranting determination of liability. Section 31A of the Valuers Act will only be applicable if LPPEH is subsequently sued by the plaintiff in respect of its actions *vis a vis* the unknown person(s). The preliminary objection was dismissed. (para 29) A
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- (2) LPPEH admitted it received the impugned letter sent by the unknown person(s) but LPPEH denied sending a reply to the unknown person(s) *ie*, the fake LPPEH email. It was this fake LPPEH email which the plaintiff alleged had been circulated by the unknown person(s) to certain parties *ie*, the Chairmen of the development projects under Senibong Cove and the residents of Senibong Cove, and further published and/or caused to be published words which were defamatory to the plaintiff in a letter attached to the LPPEH's email. A perusal of the fake LPPEH email showed that it was sent by a Josephine to a person whose name/email was redacted, the contents of which suggested that the plaintiff was practicing illegally. LPPEH had inadvertently been used by the unknown person(s) to deliberately commit a tort of defamation against the plaintiff. The plaintiff was clearly entitled to seek pre-action discovery of the impugned letter to LPPEH to identify the unknown person(s). The plaintiff had satisfied O. 24 r. 7A(5) of the ROC. (paras 40-44) C
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- (3) The plaintiff had also satisfied O. 24 r. 8 and r. 13 of the ROC as the order sought for the production by the defendant here of the impugned letter to LPPEH for inspection by the plaintiff was necessary to determine if it could commence a claim against the unknown person(s). The discovery order therefore was necessarily firstly, for disposing fairly of the cause or matter and secondly, for saving costs. (para 45) F
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- (4) The ground submitted by LPPEH that the documents/information sought by the plaintiff was privileged was without merit. The Valuers Act had no provision that supported such proposition. In addition, LPPEH's assertion of privilege to prevent disclosure of the impugned letter to LPPEH was inconsistent with its own assertion that the LPPEH's email circulated by the unknown person(s) who sent the impugned letter to LPPEH was a fake. LPPEH should not seek to prevent the plaintiff from finding out who created the fake LPPEH's email and taking legal action thereafter. (paras 49 & 53) H
- (5) The plaintiff did not know who sent the impugned letter to LPPEH or circulated the fake LPPEH email. The plaintiff only suspected the senders were one Michael Robert Stevens and one Anthony L Emms, I

- A the named persons in the plaintiff's draft statement of claim. An order for pre-action discovery would definitely give clarity to this issue. If the impugned letter to LPPEH ordered to be discovered showed that these two persons were not the senders, then the plaintiff would know if it could commence a claim against them. Such an approach was not only
- B fair but sensible and practical as it could obviously avoid unnecessary litigation thus saving costs and preventing wastage of time and resources which was what pre-action discovery seeks to achieve. (para 54)
- (6) LPPEH had not shown how a pre-action discovery order to identify the persons who sent the fake LPPEH email would interfere with or prevent
- C the statutory functions of LPPEH. To expose the tortfeasor would surely promote the statutory functions of LPPEH as it sent a strong signal that such irresponsible act would not be tolerated. (para 55)
- (7) The plaintiff had identified the documents sought to be discovered. The plaintiff's application was not a 'fishing expedition' in the context of an
- D aimless trawling of an unlimited sea. The plaintiff knew a specific and identifiable spot into which he wished to drop his line. The plaintiff had dropped his line and had clearly identified the documents he wanted. Since the plaintiff knew where the fish were, this was not called a 'fishing expedition.' This was called catching fish! (para 57)
- E (8) The plaintiff was thus entitled to pre-action discovery of the impugned letter to LPPEH but not the LPPEH fake email as LPPEH had put on record that the said email did not exist as no such email was sent by LPPEH. This court also did not order pre-action discovery of the
- F correspondence between the unknown person(s) and LPPEH as this correspondence was not necessary for the plaintiff to identify the unknown person(s) and to review if it had a valid claim for defamation against the unknown person(s). There was no reason for LPPEH to obstruct disclosure since the unknown person(s) had used LPPEH's reply to him or her to further his or her agenda by deliberately not
- G redacting LPPEH's name but redacting his or her name from the fake LPPEH email circulated to members of the public. (paras 58 & 59)

Case(s) referred to:

- Abdul Aziz Lebai Milin & Ors v. Suruhanjaya Pengangkutan Awam Darat* [2016] MLJU 1873 (*refd*)
- H *Bandar Utama Development Sdn Bhd & Anor v. Bandar Utama 1 JMB* [2019] 10 CLJ 516 CA (*refd*)
- Billion Prima Sdn Bhd & Anor v. Nutech Company Ltd & Anor* [2017] 1 CLJ 179 HC (*refd*)
- Dato' Dr Low Bin Tick v. Datuk Chong Tho Chin & Other Appeals* [2017] 8 CLJ 369 FC (*refd*)
- Dato' Pahlawan Ramli Yusuff v. Tan Sri Abdul Gani Patail & Ors* [2014] 9 CLJ 489 HC (*refd*)
- I *Datuk Seri Ahmad Said Hamdan & Ors v. Tan Boon Wah* [2010] 6 CLJ 142 CA (*dist*)
- Ernest Cheong Yong Yin v. Low Kim Yap & Ors* [2006] 6 CLJ 608 HC (*refd*)
- Infoline Sdn Bhd v. Benjamin Lim Keong Hoe* [2017] 8 CLJ 554 CA (*refd*)

Kalthum Kassim v. Dollar Yakim & Ors [2003] 1 LNS 543 HC (*refd*)
Karthak v. Damai [1962] 1 LNS 65 HC (*refd*)
Norwich Pharmacal Company v. Customs and Excise Commissioners [1973] 3 WLR 164 (*refd*)
Sanmugam Ponnugam Ponnann v. Halijah Abbas & Anor [2013] 1 LNS 257 HC (*refd*)
Thyssen Hunnebeck Singapore Pte Ltd v. TTJ Civil Engineering Pte Ltd [2003] 1 SLR 75 (*refd*)

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Legislation referred to:

Evidence Act 1950, ss. 126, 127, 128, 129
 Malaysian Anti-Corruption Commission Act 2009, s. 72
 Rules of Court 2012, O. 24 rr. 6, 7A(5), (9), 8, 13, O. 92 r. 4
 Valuers, Appraisers, Estate Agents and Property Managers Act 1981, s. 31A

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Other source(s) referred to:

Dato' Mahadev Shanker, *Summom Bonum The Ultimate Good*, Santhi Latha 2021 edn, p 221

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For the plaintiff - Jesselyn Tham; M/s Thomas Philip

For the defendant - S Murthi & Hemashantini; M/s S Murthi & Assocs

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Reported by Suhainah Wahiduddin

JUDGMENT

Leong Wai Hong JC:

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Introduction

[1] This is an application for pre-action discovery by the plaintiff to identify an intended defendant from, *inter alia*, a letter sent by the intended defendant to the defendant Lembaga Penilai, Pentaksir, Ejen Harta Tanah dan Pengurus Harta ("LPPEH"), a non-party in the proposed suit.

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[2] The plaintiff wants to discover the said letter and other documents in the possession of LPPEH with a view of filing a defamation suit against the sender of the letter.

[3] I allowed the application on 9 May 2022 but confined discovery to only the said letter out of two specified documents and a class of documents sought by the plaintiff. LPPEH has nonetheless appealed to the Court of Appeal. These are my grounds of judgment.

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Background Facts

The Plaintiff's Pleadings Case

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[4] The plaintiff's OS against LPPEH is for a pre-action discovery under O. 24 r. 7A, O. 92 r. 4 of the Rules of Court 2012 ("ROC 2012") and the inherent jurisdiction of the court seeking discovery of:

- (i) the email dated 15 March 2021 sent by Josephine Wong of LPPEH together with full details disclosing the identity and/or email address(s) of the recipient(s) and/or without any redaction thereto;

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- A (ii) the letter dated 19 February 2021 sent to LPPEH by the unknown person(s) which is referred to and/or specified in the email dated 15 March 2021; and
- (iii) any further and/or other letter, email and/or correspondence between the unknown person(s) and LPPEH concerning the plaintiff and/or containing defamatory statements made against the plaintiff.
- B [5] In its supporting affidavit the plaintiff made the following averments below.
- C [6] All companies that undertake property management are required to register with LPPEH pursuant to the Valuers, Appraisers, Estate Agents and Property Managers Act 1981 (“Act 242”).
- D [7] On 3 August 2020, LPPEH implemented two policies namely the liberalisation policy and the non-liberalisation policy, *vide* Circulars 21/2020 and 22/2020 respectively. The same had affected the plaintiff’s registration with LPPEH:
- (i) Pursuant to the implementation of the liberalisation policy, the plaintiff was required to submit a fresh application to be registered as a property manager under the said policy.
- E (ii) The plaintiff, under its previous name (Senibong Cove Management Services) had submitted its application to be registered as a property manager under the liberalisation policy (“plaintiff’s application”).
- (iii) The plaintiff had been taking active steps in complying with LPPEH’s requirements in relation to its application.
- F (iv) Sometime around 21 September 2021, the plaintiff was informed by the LPPEH’s officer that the documents required for the application were all in order and the requirements have been duly complied with. I find there is obviously something wrong with this date of 21 September 2021 as the narrative is not in chronolectal order but nothing turns on this ambiguity.
- G [8] On 19 February 2021 when the plaintiff’s application was under process, an unknown person(s) (“unknown person(s)”), issued a letter to LPPEH to raise groundless issues concerning the registration status of the plaintiff (“impugned letter to LPPEH”).
- H [9] Josephine Wong, a legal officer of LPPEH replied to the impugned letter to LPPEH *vide* an email dated 15 March 2021 (“LPPEH’s email”) with clarifications on the following:
- I (i) The obligations and functions of LPPEH.
- (ii) The law governing valuation, appraisal, estate agency and property management practice.

See: exh. “A-1” in the affidavit in support (“AIS”).

[10] The unknown person(s) proceeded to circulate LPPEH's email to the chairmen of the development projects under Senibong Cove and the residents of Senibong Cove, and further published and/or caused to be published words which are defamatory of the plaintiff in a letter attached to LPPEH's email. In this regard:

- (i) The unknown person(s) proceeded to circulate LPPEH's email to the current chairman of the WaterEdge Apartments, one of the developments under Senibong Cove, *vide* a letter on 1 May 2021 ("impugned letter to WaterEdge JMB's chairman"), alleging amongst others that the plaintiff is an illegal and incompetent property manager.

See: exh. "A-2" in the AIS.

- (ii) On 7 May 2021, the chairman of another development in Senibong Cove, namely Isola Villas had also received an anonymous letter ("impugned letter to Isola Villas' chairman") of similar content.

See: exh. "A-3" in the AIS.

[11] Subsequently, another email containing defamatory statements against the plaintiff was sent by one Anthony L Emms to LPPEH on 1 September 2021 ("impugned email to LPPEH"). In this regard:

- (i) The complainant in this impugned email to LPPEH alleged that LPPEH's instruction was not taken seriously by the plaintiff and that the plaintiff is an illegal property management company.
- (ii) A comparison of the content in the impugned email to LPPEH and the impugned letter to LPPEH displays high similarities.
- (iii) The circumstances give rise to reasonable belief that the unknown person(s) who sent the impugned letter to LPPEH could be Anthony L Emms and/or person(s) connected with Anthony L Emms.

See: exh. "A-4" in the AIS.

[12] Subsequent to the issuance of the impugned letter to LPPEH and impugned email to LPPEH, LPPEH made a police report based on the defamatory contents in the same. As a result, the plaintiff's application has been suspended indefinitely.

[13] Without the requisite authority to practise under Act 242, the plaintiff is not allowed to carry out property management practice and by reason of which:

- (i) The property management contracts between the plaintiff and the joint management bodies and management corporations have to be terminated.
- (ii) The plaintiff suffered loss of profits as a result of the letters and emails containing untrue allegation against the plaintiff as a result of the unknown person's conduct.

A [14] The police has informed the plaintiff that there was no criminal element in the circulation of the allegations and advised the plaintiff to pursue a civil action. (see plaintiff's affidavit in reply at para. 14 and exh. A-6).

B [15] Based on the foregoing, the plaintiff intends to bring a claim against the parties responsible for the defamatory remarks made against the plaintiff as well as for the economic damage and/or losses suffered by the plaintiff as a result of those defamatory remarks (the "intended claim").

LPPEH's Defence As Set Out In Its Reply Affidavit

C [16] I shall only set out the facts and averments by LPPEH that are relevant to the pre-action discovery.

[17] LPPEH admits that it did receive the impugned letter to LPPEH sent by the unknown person(s) to LPPEH.

D [18] But LPPEH, while admitting that it had corresponded with the unknown person(s), denies sending a reply to the unknown person(s) dated 15 March 2021. (see LPPEH reply affidavit at paras. 13 and 14). The plaintiff had defined this email as LPPEH email. I shall call this the fake LPPEH email.

E [19] LPPEH alleged that the fake LPPEH email circulated by the unknown person(s) (exhibited by the plaintiff as exh. "A-1" in the AIS) does not exist as there was no email from LPPEH sent to the unknown person(s) on 15 March 2021. (see LPPEH reply affidavit at para. 14).

F [20] LPPEH further alleged what is shown in plaintiff's exh. A-1, quote "is just a screenshot of a cut and paste image and not a printout of the official email. There is no confirmation of any email dated 15 March 2021 from the defendant", unquote. (see LPPEH written submissions at para. 18 [b]).

Hearing Before Me

G [21] LPPEH raised a preliminary objection that the plaintiff's OS against LPPEH is in any event unsustainable as there is a statutory immunity for LPPEH against suits and legal proceedings under s. 31A of Act 242.

[22] LPPEH also opposed the pre-action application on the following four grounds:

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- (a) The documents/information sought by the plaintiff are privileged.
 - (b) The information sought from LPPEH are not necessary for the plaintiff to formulate its cause of action against the complainants.
 - (c) Disclosure of the information sought could interfere with or prevent the statutory functions of LPPEH.
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- (d) In any event this application was a fishing expedition by the plaintiff.

Preliminary Objection By LPPEH Under Section 31A Of Act 242

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[23] I propose to deal with the preliminary objection first. Section 31A of Act 242 reads as follows:

31A. Protection against suit and legal proceedings

No action, suit, prosecution or other proceedings shall lie or be brought, instituted or maintained in any court against the Board, any Committee appointed by the Board, any members of the Board, any members of the Committee appointed by the Board or any person or officer of the Board authorised or appointed to act for or on behalf of the Board **in respect of any act, neglect or default done or committed by it or him in good faith, or any omission by it or him in good faith, in such capacity.**

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(emphasis added)

[24] LPPEH contends that this section has been drafted very widely to cover actions, suits, prosecutions and other proceedings in court. LPPEH contends that this statutory immunity includes pre-action discovery against LPPEH although LPPEH will not be an intended defendant in the intended claim by the plaintiff.

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[25] LPPEH's counsel has informed this court he has no authorities that say that statutory immunity conferred by s. 31A of Act 242 includes pre-action discovery. But he relies on four cases. They are the Court of Appeal decision in *Datuk Seri Ahmad Said Hamdan & Ors v. Tan Boon Wah* [2010] 6 CLJ 142; [2010] 3 MLJ 193; *Abdul Aziz Lebai Milin & Ors v. Suruhanjaya Pengangkutan Awam Darat* [2016] MLJU 1873; *Kalthum Kassim v. Dollar Yakim & Ors* [2003] 1 LNS 543; [2003] MLJU 650; and *Dato' Pahlawan Ramli Yusuff v. Tan Sri Abdul Gani Patail & Ors* [2014] 9 CLJ 489; [2015] 7 MLJ 763.

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[26] I have perused *Datuk Seri Ahmad Said Hamdan & Ors v. Tan Boon Wah* [2010] 6 CLJ 142; [2010] 3 MLJ 193. This case, does not stand for the proposition LPPEH's counsel is advocating. In this case the officer from MACC was sued as a defendant in the suit. It is not a pre-action discovery application. Further, the Court of Appeal declined to consider the statutory immunity point set out in s. 72 of the MACC Act. This is clear from this passage:

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Section 72 of the MACC Act provides:

No action, suit, prosecution or other proceedings whatsoever shall lie or be brought, instituted, or maintained in any court or before any other authority against:

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(a) The Government of Malaysia;

(b) Any officer or employee of the Government of Malaysia or of the Commission;

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- A (c) Any member of the Advisory Board or the Special Committee or any other committee established under or for the purposes of this Act; or
- (d) Any person lawfully acting on behalf of the Government of Malaysia, Commission, officer or employee of the Government of Malaysia or Commission,
- B for or on account of, or in respect of, any act done or statement made or omitted to be done or made, or purporting to be done or made or omitted to be done or made, in pursuance or in execution of, or intended pursuance or execution of this Act, or any order in writing, direction, instruction, notice or other thing whatsoever issued under this Act:
- C Provided that such act or such statement was done or made, or was omitted to be done or made, in good faith.
- That provision provides immunity to any officer of the MACC and, any other person specified thereunder against any suit, action, prosecution or proceeding in any court in respect of any act *etc*, done in the execution of the MACC Act, provided that such act was done in good faith.
- D **However, in view of our finding that the appellants had not acted in contravention of s. 30(3)(a) of the MACC Act, it is not necessary for us to rule on the applicability of s. 72 of the MACC Act.**
- (emphasis added)
- E [27] I have also perused *Abdul Aziz Lebai Milin & Ors v. Suruhanjaya Pengangkutan Awam Darat* [2016] MLJU 1873, *Kalthum Kassim v. Dollar Yakim & Ors* [2003] 1 LNS 543; [2003] MLJU 650; and *Dato' Pahlawan Ramli Yusuff v. Tan Sri Abdul Gani Patail & Ors* [2014] 9 CLJ 489; [2015] 7 MLJ
- F 763. They are also not pre-action discovery applications. These cases therefore do not support LPPEH's contention that the plaintiff cannot file a pre-action discovery application against LPPEH.
- [28] Further, in *Dato' Pahlawan Ramli Yusuff v. Tan Sri Abdul Gani Patail & Ors* [2014] 9 CLJ 489; [2015] 7 MLJ 763 Vazeer Alam Mydin Meera JC said
- G that such statutory immunity provisions do not prevent a suit from been filed as the immunity only covers acts done in good faith which needs to be tried at trial:
- [81] The proviso to s. 72 of the Malaysian Anti-Corruption Commission Act 2009, makes it abundantly clear that immunity against actions, suits or prosecution is only available when the act complained of was done in good faith. There is no blanket immunity. A similar immunity provision is found in s. 77 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2011, and here too, there is a similar proviso to the effect that the immunity afforded is subject to the requirement of good faith in the exercise of the powers in that statute by any public officer.
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[29] In my view, pre-action discovery applications do not fall within the ambit of statutory immunity against actions, suits or prosecution such as in s. 31A of Act 242 as there is no suit alleging wrongdoing on the part of LPPEH warranting determination of liability. Section 31A of Act 242 will only be applicable if LPPEH is subsequently sued by the plaintiff in respect of its actions *vis-à-vis* the unknown person(s). I therefore dismiss this preliminary objection.

[30] I will now proceed to consider the plaintiff's pre-action discovery application on its merits.

A Review Of The Law On Pre-action Discovery In Malaysia

Applicable Rules Of Court

[31] Order 24 r. 7A, O. 24 r. 8 and O. 24 r. 13 ROC 2012 are the applicable rules on pre-action discovery. They read as follows:

Discovery against other person (O. 24 r. 7A)

7A. (1) *An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.*

(2) An application after the commencement of proceedings for an order for the discovery of documents by a person who is not a party to the proceedings shall be made by a notice of application, which shall be served on that person personally and on every party to the proceedings.

(3) An originating summons under para. (1) or a notice of application under para. (2) shall be supported by an affidavit which shall:

(a) In the case of an originating summons under para. (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in court; and

(b) In any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the identity of the likely parties to the proceedings, or both, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

(4) A copy of the supporting affidavit shall be served with the originating summons or the notice of application on every person on whom the originating summons or the notice of application is required to be served.

- A (5) *An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the court thinks it just to make such an order, and on such terms as it thinks just.*
- B (6) An order for the discovery of documents may:
- (a) Be made conditional on the applicant giving security for the costs of the person against whom it is made or on such other terms, if any, as the court thinks just; and
- (b) Require the person against whom the order is made to make an affidavit stating whether the documents specified or described in the order are, or at any time have been, in his possession, custody or power and, if not then in his possession, custody or power, when he parted with them and what has become of them.
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- D (7) A person shall not be compelled by such an order to produce any document which he could not be compelled to produce:
- (a) In the case of an originating summons under para. (1), if the subsequent proceedings had already been commenced; or
- (b) In the case of a notice of application under para. (2), if he had been served with a subpoena to produce documents at the trial.
- E (8) For the purposes of rules 10 and 11, an application for an order under this rule shall be treated as a cause or matter between the applicant and the person against whom the order is sought.
- (9) Unless the court orders otherwise, where an application is made in accordance with this rule for an order, *the person against whom the order is sought shall be entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis.*
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- Discovery to be ordered only if necessary (O. 24 r. 8)**
8. On the hearing of an application for an order under rule 3, 7 or 7A, the court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.
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- Production to be ordered only if necessary (O. 24, r. 13)**
- H 13. (1) *An order for the production of any documents for inspection or to the court shall not be made under any of the foregoing rules unless the court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.*
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(2) Where on an application under this Order for production of any document for inspection or to the court, privilege from such production is claimed or objection is made to such production on any other ground, the court may inspect the document for the purpose of deciding whether the claim or objection is valid.

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(emphasis added)

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Relevant Malaysian Case Law On Pre-action Discovery

[32] There are two leading authorities on this area of the law in Malaysia. Both are Court of Appeal judgments. They are *Infoline Sdn Bhd v. Benjamin Lim Keong Hoe* [2017] 8 CLJ 554 CA (“*Infoline*”) and the subsequent case of *Bandar Utama Development Sdn Bhd & Anor v. Bandar Utama 1 JMB* [2019] 10 CLJ 516; [2018] MLJU 697 CA (“*Bandar Utama Development*”). In both panels sit Mary Lim JCA.

C

Infoline

[33] In *Infoline* Mary Lim JCA (delivering the judgment of the court) has this to say of the history of pre-action discovery and the rationale for the insertion of the new O. 24 r. 7A in our ROC 2012:

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[9] *Although agreeing that confidentiality of the trust documents is an important consideration when determining whether or not a trustee should make disclosure of information relating to the trust, Her Ladyship was nevertheless of the opinion that confidentiality should be weighed or balanced with the right of the beneficiary or ex-beneficiary, in wanting to know his rights and entitlement under the trust deed. According to Her Ladyship, “it is just and fair that the respondent be allowed to know that his removal as a beneficiary was done in accordance with the provisions of the trust deed, and he can only know that if he has sight of that trust deed”. Consequently, the court was of the view that the respondent was “entitled to see the provisions of the trust deed in order to check for himself whether his removal as beneficiary has been properly made in accordance with the provisions therein”. We have examined Her Ladyship’s reasoning and we agree with them. Accordingly, we dismissed the appeal with costs.*

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[12] O. 24 r. 7A is a new provision inserted under the Rules of Court 2012. Under the old regime of the Rules of the High Court 1980, any person wishing to seek or obtain discovery or disclosure of documents prior to the initiation of action could only do so under the principles established in the House of Lords’ decision in *Norwich Pharmacal Co v. Customs & Excise Commissioners* [1974] AC 133. Up until then, the courts did not order discovery against a person who is not a party to any proceedings, save at the trial and generally under pain of a subpoena *duces tecum* for the person in whose possession, custody or control the documents are with, to attend court as a witness and to produce such documents relevant to the proceedings. In *Norwich Pharmacal Co* emanated the principle that discovery may be ordered against defendants who are themselves not the wrongdoers but have somehow “got mixed up in the tortious acts of others

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- A *so as to facilitate their wrongdoing* although through no fault of his own he may incur no personal liability *but he comes under a duty to assist the person who had been wronged by giving him full information and disclosing the identity of the wrongdoers*". And, even then, the action was instituted specifically to obtain discovery against the respondent there who were not themselves wrongdoers.
- B [13] *Order 24 r. 7A is new specific provision enabling discovery in two situations. In the first scenario, discovery is sought prior to the commencement of action* whereas in the second, it is sought after commencement of proceedings but against a non-party. The application for pre-action discovery is by means of an originating summons whereas in the latter, it is by means of a notice of application ...
- C [14] *In summary, O. 24 r. 7A(3) requires an applicant seeking discovery of documents before action to:*
- D (i) State the material facts pertaining to the intended proceedings;
- (ii) State whether the person against whom the order is sought is likely to be a party in the subsequent proceedings in the High Court;
- (iii) Specify or describe the documents sought and show that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made; and
- E (iv) Identify the persons against whom the order is sought is likely to have or had the documents in his possession, custody or power.
- (emphasis added)
- [34] In *Infoline*, Mary Lim JCA has this to say of Singapore cases which had considered their equivalent of our O. 24 r. 7A, which is O. 24 r. 6:
- F [16] Given that O. 24 r. 7A is new provision under our Rules of Court 2012, the respondent had invited the court to consider the approach of the courts in Singapore on the operation and application of their equivalent O. 24 r. 7A, which is O. 24 r. 6. Having considered them, we are not disinclined to follow them finding the cases cited persuasive as
- G the procedural requirements on pre-action discovery are substantially similar.
- [17] The leading authority is the Court of Appeal's decision in *Kuah Kok Kim v. Ernst & Young* [1996] 3 SLR (R) 485, a decision under the old O. 24 r. 7A, now amended to O. 24 r. 6.
- H ...
- [19] Subsequently, Lai J in *Ching Mun Fong v. Standard Chartered Bank* [2012] 2 SLR 22, held that a pre-action application is particularly appropriate where the applicant needs information or evidence "to mount a claim, and not to fish for additional evidence to ground further causes of action":
- I 8. What then is the purpose of pre-action discovery? In *Kuah Kok Kim v. Ernst & Young* [1996] 3 SLR (R) 485 ("*Kuah Kok Kim*") at [31], the Court of Appeal explained that *pre-action discovery is to assist a*

plaintiff who “does not yet know whether he has a viable claim against the defendant, and the rule is there to assist him in his search for the answer”. The word “viable” must not be understood to mean that the plaintiff is entitled to pre-action discovery for the purposes of augmenting his case or to “complete his entire picture of the case”. If that was the case, the ordinary processes of general and specific discovery under O. 24 rr. 1 and 5 respectively would be subverted ... Instead pre-action discovery serves a somewhat more modest purpose: it is merely to allow the plaintiff who suspects he has a case to obtain the necessary information to allow him to commence proceedings.

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[20] Three cases were examined by Lai J; namely *Bayerische Hypo-und Vereinsbank AG v. Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR (R) 39 and *Ng Giok Oh v. Sajjad Akhtar* [2003] 1 SLR (R) 375 where the applications were refused; and *Beckett Pte Ltd v. Deutsche Bank AG Singapore Branch* [2003] SLR (R) 321 where the application was allowed. In both *Asia Pacific Breweries* and *Ng Giok Oh*, the applicants already knew their causes of action and were not otherwise constrained from commencing proceedings. The applications were really to enable the applicants to assess or augment the strength of their case. In *Beckett Pte Ltd* however, the position was somewhat different. The defendant bank (qua pledgee) had sold certain shares belonging to the applicant (qua pledgor). The application for pre-action discovery of documents relating to the “details of the manner of sale of the pledged shares (whether by private treaty or auction)” was granted because the court found that without the information sought, the applicant would have no idea whether it had a basis to bring a claim against the defendant for failing to take reasonable steps to obtain the best price.

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[21] Further, Lai J was of the view that the Rules of Court:

... exists to provide a systematic and orderly process for the discovery of evidence leading to trial. The rule allowing for pre-action discovery complements this by helping potential plaintiffs to ascertain if they are in a position to commence proceedings: by virtue of the disclosed documents the potential plaintiff will be able to decide if he has a cause of action against the defendant.

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(emphasis added)

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[35] In *Infoline*, Mary Lim JCA after reviewing Singapore, UK and Australian case law summarised the principles applicable as follows:

[36] Considering the appeal properly under O. 24 r. 7A, we are of the view that the whole intent behind O. 24 r. 7A is the saving of costs, resources and time if early discovery is ordered, in fact ordered even before proceedings are commenced. If discovery reveals that the applicant’s concerns are unfounded, that in this case the respondent’s termination or cessation as a beneficiary is proper and in accord with the terms of the trust deed, litigation can largely be avoided. This obviously means saving of both time and costs ...

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- A [37] With those considerations, what O. 24 r. 7A then requires from the applicant is an explanation as to why pre-action discovery and not discovery in the course of action or proceedings is necessary. The requisites in O. 24 r. 7A(3) indicate that *pre-action discovery is really to assist a prospective litigant plaintiff to determine whether he has a viable claim against the intended defendant ...*
- B [38] Insofar as the documents sought to be discovered are concerned, the documents must be specified or sufficiently described. All this is for practical purposes so that the order is capable of response and compliance from and by the defendant who is the appellant before us ...
- C [39] Finally, the applicant has to identify the person having possession, custody or power over the documents sought ...
- D [42] Therefore, in exercising discretion whether to grant discovery of specified or described documents in the possession, custody or power of the appellant, the respondent must satisfy the court that discovery of the same before filing of action against the appellant is indeed necessary, necessary at the particular stage of the application, and that is necessary because the order of discovery will allow for the fair disposal of the cause or matter or that it will lead to a saving of costs. *The respondent must show that the discovery is necessarily required even before an action is initiated as it is precisely to enable the respondent to decide whether he can even commence action against the appellant in particular, to start with. And, if the information revealed from that discovery can determine or assist in reaching an answer to that predicament, then the order ought to be made. Such an approach is not only fair but sensible and practical as it can obviously avoid unnecessary litigation thus saving costs and preventing wastage of time and resources which is what pre-action discovery seeks to achieve.* Where the court is of the opinion that the applicant is unable to satisfy these conditions, certainly the court must dismiss the application as is apparent from the terms of r. 8.
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(emphasis added)

Bandar Utama Development

- G [36] In *Bandar Utama Development*, Hamid Sultan Abu Backer JCA (delivering the judgment of the court) after saying that Mary Lim JCA's judgment in *Infoline* must be read together with his judgment said the threshold test to satisfy an order for pre-action discovery under O. 24 r. 7A is extremely high in contrast to common law right:
- H [12] Pre-action discovery is not related to contractual parties but it is addressed to third parties who may be tortfeasors, *etc.* or parties who are necessary for the purported plaintiff to succeed in a claim or a potential party to be the defendant. As a general rule, pre-action discovery can relate to proposed cause of action as well as relief. The threshold test to satisfy an order for pre-action discovery at common law was high in contrast to application for discovery in an action. **The threshold test to satisfy an order for pre-action discovery under Order 24 rule 7A is extremely high in contrast to common law right**, as the rules sets out
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specific requirements and the court must exercise its power with caution and circumspect. It is a power which must be exercised in a genuine case and not for the purpose of annoying a third party or in cases related to fishing expedition, *etc.*

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(emphasis added)

[37] In *Bandar Utama Development*, Hamid Sultan Abu Backer JCA went on to review the leading UK case which reviewed and settled the common law jurisprudence on pre-action discovery. The case was *Norwich Pharmacal Company v. Customs and Excise Commissioners* [1973] 3 WLR 164 (“*Norwich*”), which in essence held that it is “a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.”

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[13] The common law position for pre-action discovery was explained in great detail by House of Lords in *Norwich Pharmacal Company v Customs and Excise Commissioners* [1973] 3 WLR 164. A part of the judgment is reproduced here to appreciate the intricate jurisprudence. The said part reads as follows:

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My noble and learned friends, Lord Cross of Chelsea and Lord Kilbrandon, have dealt with the authorities. ... *They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facility their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should cooperate in righting the wrong if he unwittingly facilitated its perpetration.*

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I am more inclined to reach this result because it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability. I would therefore hold that the respondents must disclose the information now sought unless there is some consideration of public policy which prevents that.

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Apart from public policy the respondents say that they are prevented by law from making this disclosure. I agree with your Lordships that is not so. If it were they could not even disclose such information in a serious criminal case, but their counsel were, quite rightly, not prepared to press their argument so far as that.

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A *So we have to weigh the requirements of justice to the appellants against the consideration put forward by the respondents as justifying nondisclosure. They are twofold. First it is said that to make such disclosures would or might impair or hamper the efficient conduct of their important statutory duties. And secondly it is said that such disclosure would or might be prejudicial to those whose identity would be disclosed.*

B *There is nothing secret or confidential in the information sought or in the documents which came into the hands of the respondents containing that information. Those documents are ordinary commercial documents which pass through many different hands. But it is said that those who do not wish to have their names disclosed might concoct false documents and thereby hamper the work of the customs. That would require at least a conspiracy between the foreign consignor and the importer and it seems to me to be in the highest degree improbable. It appears that there are already arrangements in operation by the respondents restricting the disclosure of certain matters if the importers do not wish them to be disclosed. It may be that the knowledge that a court might order discovery in certain cases would cause somewhat greater use to be made of these arrangements. But it was not suggested in argument that is a matter of any vital importance. The only other point was that such disclosure might cause resentment and impair good relations with other traders; but I find it impossible to believe that honest traders would resent failure to protect wrongdoers.*

E *Protection of traders from having their names disclosed is a more difficult matter. If we could be sure that those whose names are sought are all tortfeasors, they do not deserve any protection. In the present case the possibility that any are not is so remote that I think it can be neglected. The only possible way in which any of these imports could be legitimate and not an infringement would seem to be that someone might have exported some furazolidone from this country and then whoever owned it abroad might have sent it back here. Then there would be no infringement. But again that seems most unlikely.*

G (emphasis added)

[38] In *Bandar Utama Development*, Hamid Sultan Abu Backer JCA then summarised his understanding of *Norwich* as follows:

H *[14] In the Norwich case, the House of Lords stated that where a person, albeit innocently and without incurring any personal liability, became involved in the tortious acts of others, he came under a duty to assist one injured by those acts by giving him full information by way of discovery and disclosing the identity of the wrongdoers, and for that purpose it mattered not that such involvement was the result of voluntary action or the consequence of the performance of a statutory duty or otherwise; and that, accordingly, prima facie the respondents were under a duty to disclose the information sought. In this case, the court held that a party could*

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bring a specific action by writ against a person for discovery in the name of a potential defendant if that person has facilitated the wrongdoing of the potential defendant and has the necessary information ...

(emphasis added)

A Summary Of The Law On Pre-action Discovery

[39] In my view, the following are the principles to be applied by a Malaysian court on pre-action discovery as distilled from O. 24 r. 7A, O. 24 r. 8 and O. 24 r. 13 ROC 2012, *Norwich, Infoline, Bandar Utama Development* and related case law:

- (i) The burden of proof lies on the plaintiff to show that the Malaysian court should exercise its discretion to grant a pre-action discovery.
- (ii) In respect of a pre-action discovery for a defendant to disclose documents on the identity of the wrongdoers, the plaintiff should show that the defendant although not the wrongdoers, has somehow got mixed up in the tortious acts of that wrongdoers so as to facilitate their wrongdoings so that he comes under a duty to assist the plaintiff who had been wronged by disclosing the identity of the wrongdoers.
- (iii) In respect of a pre-action discovery for information contained in a document to be provided by a defendant the plaintiff must show that the information is necessary in order for him to determine if he can even commence legal action against the intended defendant. In such cases, the pre-action discovery order ought to be made to avoid unnecessary litigation thus saving costs, preventing wastage of time and resources.
- (iv) To resist disclosure, the defendant can show that the plaintiff is on a fishing trip or fishing expedition. In such a situation, the application will be dismissed. One of the most vivid analogies of what amounts to a fishing trip or fishing expedition is this judgment by the Singapore High Court in *Thyssen Hunnebeck Singapore Pte Ltd v. TTJ Civil Engineering Pte Ltd* [2003] 1 SLR 75 Choo Han Teck JC and applied in *Billion Prima Sdn Bhd & Anor v. Nutech Company Ltd & Anor* [2017] 1 CLJ 179; [2017] 10 MLJ 213 Wong Kian Kheong JC:

6. In my view, I would hold that a 'fishing expedition' in the context of discovery refers to the aimless trawling of an unlimited sea. Where, on the other hand, the party concerned knows a specific and identifiable spot into which he wishes to drop a line (or two), I would not regard that as a 'fishing expedition'.

(emphasis added)

- (v) As an aside, it would not be remiss of me to add that using the act of fishing as an analogy to illustrate what is or is not a fishing expedition has respectable provenance. Retired Court of Appeal Judge Mahadev Shankar narrated observing Punch Coomaraswamy, at the time a

- A Senior Partner at Braddell Brothers, rebutting his learned friend's submission that in his application for discovery he was on a fishing expedition by saying "My Lord, a fishing expedition is one where the applicant does not clearly know what documents he is after ... My case is not like that. I have identified the documents I require these people to disclose. Since I know where the fish are, this is not a fishing expedition." (see *Summum Bonum: The Ultimate Good* by Dato' Mahadev Shankar collated and edited by Santhi Latha 2021 edn, at p. 221).
- B
- C (vi) To resist disclosure, the defendant can also show that that there is some consideration of public policy which prevents him from making this disclosure. Consideration of public policy which can prevent him from making disclosure maybe that such disclosures would or might impair or hamper the efficient conduct of a defendant's important statutory duties. And secondly such disclosure would or might be prejudicial to those whose identity would be disclosed. The court will then have to do a balancing act by examining the facts. On the whole, if a document would be discoverable in a discovery application filed once a suit is commenced, such a document should be discoverable. Especially if its disclosure now is necessary in order for the plaintiff to determine if he can even commence legal action against an intended defendant. For in such cases, the pre-action discovery order ought to be made to avoid unnecessary litigation thus saving costs, preventing wastage of time and resources which is the very objective of O. 24 r. 7A ROC 2012.
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- F (vii) Apart from considerations of public policy that prevent disclosure, the defendant can also show that he is prevented by common law or some statute from making this disclosure. Statutory defences available are for example legal professional privilege under ss. 126 to 129 of the Evidence Act 1950 or documents and information protected under the Official Secrets Act 1972.
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- H (viii) When ordering pre-action discovery, a defendant is entitled to his costs of the application, unless the court orders otherwise, and of producing a copy each of the documents ordered on an indemnity basis. (see O. 24 r. 7A(9) ROC 2012). Thus, a defendant who sought the protection of a court order before giving pre-action discovery should be entitled to his costs of the application unless the court is of the view the defendant had unreasonably opposed the application. For practical purposes, it is useful for the court to request parties to agree on the costs of the defendant for producing a copy each of the documents ordered. O. 24 r. 7A(9) ROC 2012 reads as follows –
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Unless the court orders otherwise, where an application is made in accordance with this rule for an order, the person against whom the order is sought shall be entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis.

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My Analysis Of The Facts Of This Case

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[40] LPPEH admits that it did receive the impugned letter sent by unknown person(s) to LPPEH. But LPPEH denies sending a reply to the unknown person(s) dated 15 March 2021 *ie*, the fake LPPEH email. (see LPPEH reply affidavit at paras. 13 and 14)

[41] It is this fake LPPEH email which the plaintiff alleged has been circulated by the unknown person(s) to the chairman of the development projects under Senibong Cove and the residents of Senibong Cove, and further published and/or caused to be published words which are defamatory to the plaintiff in a letter attached to the LPPEH's email.

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[42] A perusal of the fake LPPEH email (alleged to be a fake by LPPEH) showed that it was sent by a Josephine dated 15 March 2021 to a person whose name/email is REDACTED. This email states "I am Josephine Wong, the legal officer of LPPEH. This email is in reference to your letter to us dated 19 February 2021, which was received by LPPEH on 2 March 2021 ...". The contents of this fake LPPEH email suggest that the plaintiff is practising illegally.

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[43] LPPEH has not averred on affidavit that LPPEH is acting against the unknown person(s) on this circulation of this fake LPPEH email. No reasons were offered to this court for the inaction.

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[44] In my view the facts above show clearly that LPPEH had inadvertently been used by the unknown person(s) to deliberately commit a tort of defamation against the plaintiff. The plaintiff is clearly entitled to seek pre-action discovery of the impugned letter to LPPEH to identify the unknown person(s). The plaintiff has clearly satisfied O. 24 r. 7A(5) ROC 2012 which reads:

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An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the court thinks it just to make such an order, and on such terms as it thinks just.

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(emphasis added)

[45] In my view, the plaintiff has also satisfied O. 24 r. 8 and r. 13 ROC 2012 as the order sought for the production by the defendant here of the impugned letter to LPPEH for inspection by the plaintiff is necessary to determine if it can commence a claim against the unknown person(s). The discovery order therefore is necessary firstly, for disposing fairly of the cause or matter and secondly, for saving costs.

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A [46] The plaintiff's application to seek pre-action discovery of the impugned letter to LPPEH to identify the unknown person(s) is clearly supported by the following statements in these cases:

- B (a) "In *Norwich Pharmacal Co* emanated the principle that discovery may be ordered against defendants who are themselves not the wrongdoers but have somehow "got mixed up in the tortious acts of others so as to facilitate their wrongdoing although through no fault of his own he may incur no personal liability but he comes under a duty to assist the person who had been wronged by giving him full information and disclosing the identity of the wrongdoers". [see *Infoline* at [12]]
- C (b) "Instead pre-action discovery serves a somewhat more modest purpose: it is merely to allow the plaintiff who suspects he has a case to obtain the necessary information to allow him to commence proceedings." [see *Infoline* at [19]]
- D (c) it is clear that if the person mixed up in the affair has to any extent incurred any liability to the person wronged he must make full disclosure even though the person wronged has no intention of proceeding against him. It would I think be quite illogical to make his obligation to disclose the identity of the real offenders depend on whether or not he has himself incurred some minor liability. I would therefore hold that the respondents must disclose the information now sought unless there is some consideration of public policy which prevents that. [see *Bandar Utama Development* at [13] setting out a passage from the judgment of *Norwich*]
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F [47] I will now consider the grounds raised by LPPEH to resist this pre-action discovery application.

[48] To recap, LPPEH has raised the following four grounds:

- G (a) The documents/information sought by the plaintiff are privileged.
(b) The information sought from LPPEH are not necessary for the plaintiff to formulate its cause of action against the complainants.
(c) Disclosure of the information sought could interfere with or prevent the statutory functions of LPPEH.
(d) In any event this application was a fishing expedition by the plaintiff.

H *LPPEH Ground [a] – The Documents/Information Sought By The Plaintiff Are Privileged*

[49] This ground is without merits. Counsel for LPPEH has admitted to this court during oral submissions that Act 242 has no provision that supports such a proposition.

I [50] The cases cited by learned counsel in support of such a proposition *Karthak v. Damai* [1962] 1 LNS 65; [1962] 1 MLJ 423, *Sanmugam Ponnugam Ponnann v. Halijah Abbas & Anor* [2013] 1 LNS 257; [2013] 10 MLJ 74, *Dato' Dr Low Bin Tick v. Datuk Chong Tho Chin & Other Appeals* [2017] 8 CLJ 369;

[2017] 5 MLJ 413 and *Ernest Cheong Yong Yin v. Low Kim Yap & Ors* [2006] 6 CLJ 608; [2006] 5 MLJ 780 are all authorities on whether any complaint made by a defendant who is sued for defamation is qualified privilege under the law of defamation. Such authorities are irrelevant to the issue whether the documents/information sought by the plaintiff are privileged. A

[51] Further in all these cases the complaint documents in question were produced in court proceedings for the courts to determine whether the defendants there were entitled to the defence of qualified privilege under the law of defamation. B

[52] Likewise, if the document sought here are relied on by the plaintiff to sue the sender for defamation, the defence of qualified privilege under the law of defamation may be invoked for the court to decide its applicability. C

[53] In addition, LPPEH's assertion of privilege to prevent disclosure of the impugned letter to LPPEH is inconsistent with its own assertion that the LPPEH's email circulated by the unknown person(s) who sent the impugned letter to LPPEH is a fake. I would have thought LPPEH would not sought to prevent the plaintiff from finding out who created the fake LPPEH's email and taking legal action thereafter. D

LPPEH Ground [b] – The Information Sought From LPPEH Are Not Necessary For The Plaintiff To Formulate Its Cause Of Action Against The Complainants E

[54] This ground is invalid. The plaintiff does not know who sent the impugned letter to LPPEH or circulated the fake LPPEH email. LPPEH asserted the plaintiff knows the senders are Micheal Robert Stevens and Anthony L. Emms as the plaintiff had named them in its draft statement of claim exhibited as A-4 in AIS. This is not correct. These two persons are suspected by the plaintiff as the senders. An order for pre-action discovery in this case will definitely give clarity to this issue. If the impugned letter to LPPEH ordered to be discovered shows that these two persons were not the senders, then the plaintiff will know if it can commence a claim against them. Such an approach is not only fair but sensible and practical as it can obviously avoid unnecessary litigation thus saving costs and preventing wastage of time and resources which is what pre-action discovery seeks to achieve. [see *Infoline* at [42]] F G

LPPEH Ground [c] – Disclosure Of The Information Sought Could Interfere With Or Prevent The Statutory Functions Of LPPEH H

[55] LPPEH has not shown how a pre-action discovery order in this case to identify the person who sent the fake LPPEH email will interfere with or prevent the statutory functions of LPPEH. To expose the tortfeasor will surely promotes the statutory functions of LPPEH as it sends a strong signal that such irresponsible act will not be tolerated. I

- A [56] Further, this is what the House of Lords say in *Norwich* of an application to discover wrongdoers – “Protection of traders from having their names disclosed is a more difficult matter. If we could be sure that those whose names are sought are all tortfeasors, they do not deserve any protection. In the present case the possibility that any are not is so remote that I think it can be neglected.”
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LPPEH Ground [d] – In Any Event This Application Was A Fishing Expedition By The Plaintiff

- C [57] The plaintiff has identified the documents sought to be discovered. This includes the impugned letter to LPPEH. Applying the trawl and drop analogy used by the Singapore High Court in *Thyssen Hunnebeck Singapore Pte Ltd v. TTJ Civil Engineering Pte Ltd* [2003] 1 SLR 75 Choo Han Teck JC, followed in *Billion Prima Sdn Bhd & Anor v. Nutech Company Ltd & Anor* [2017] 1 CLJ 179; [2017] 10 MLJ 213 Wong Kian Kheong JC, I hold that the plaintiff’s application is not a ‘fishing expedition’ in the context of an aimless trawling of an unlimited sea. The plaintiff knows a specific and identifiable spot into which he wishes to drop his line. The plaintiff has dropped his line. The plaintiff has clearly identified the documents he wants. Since the plaintiff knows where the fish are, this is not called a ‘fishing expedition’. This is called catching fish!
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E **Decision**

- F [58] I am of the view the plaintiff is entitled to pre-action discovery of the impugned letter to LPPEH for the reasons stated above. Since LPPEH has put on record the LPPEH’s email/fake LPPEH’s email does not exist as no such email was sent by LPPEH I will not order pre-action discovery of LPPEH’s email. I will also not order pre-action discovery of the correspondence between the unknown person(s) and LPPEH as this correspondence is not necessary for the plaintiff to identify the unknown person(s) and to review if it has a valid claim for defamation against the unknown person(s).
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- [59] I see no reason for LPPEH to obstruct disclosure since the unknown person(s) have used LPPEH’s reply to him or her to further his or her agenda by deliberately not redacting LPPEH’s name but redacting his or her name from the fake LPPEH email circulated to members of the public.

- H [60] In the premises, I allow the OS prayer 1[a] but only in respect of document no 2 in Appendix A. I also allow prayers 1[b], 2, 3 and 4 but time for compliance of seven days stated in prayers 1 and 2 changed to 14 days. I order the plaintiff to pay RM350 to LPPEH for the document supplied. Each party to bear own costs.

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